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In the Supreme Court of the United States

October Term, 1961

No. 659

[redacted]

Petitioner,

v.

[redacted]

Respondent.

[redacted]

[redacted]

[redacted]

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INDEX

	Page
Opinion below	1
Jurisdiction	2
Questions presented	2
Statute involved	2
Statement	3
Argument	6
Conclusion	10

CITATIONS

Cases:	
Braverman v. *United States*, 317 U.S. 49	7
Christiansen v. *United States*, 52 F. 2d 950	8
Jordan v. *De George*, 341 U.S. 223	5, 6, 7
Langley v. *United States*, 8 F. 2d 815	8
Lo Hop v. *United States*, 257 Fed. 489	10
Takeo Tadano v. *Manney*, 160 F. 2d 665	10
United States v. *Patten*, 226 U.S. 525	8
United States v. *Zimmerman*, 71 F. Supp. 534	9
United States ex rel. Berlandi v. *Reimer*, 113 F. 2d 429	7
United States ex rel. Guarino v. *Uhl*, 107 F. 2d 399	9
United States ex rel. Zaffarano v. *Corsi*, 63 F. 2d 757	9
Wong Sun Fay v. *United States*, 13 F. 2d 67	10
Statutes:	
Immigration and Naturalization Act of 1952, 66 Stat. 163:	
Sec. 241(a)(4)	2, 3, 6
Sec. 242(b)	9
18 U.S.C. 88 (1940 ed.) (now 18 U.S.C. 371)	3, 4
26 U.S.C. (1940 ed.) 2806(f)	4
26 U.S.C. (1940 ed.) 2833	4

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 938

TOM MORGANO, PETITIONER

v.

ALVA PILLIOD, DISTRICT DIRECTOR
IMMIGRATION AND NATURALIZATION SERVICE
CHICAGO, ILLINOIS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (C.A. App. 1-5[1]; Pet. App. 2a–6a) is reported at 299 F. 2d 247. The order of the district court granting respondent's motion for summary judgment (R. 153–154; Pet. App. 1a) is not reported.

[1] "C.A. App." refers to the stapled documents relating to the proceedings in the court of appeals. "R." refers to a bound volume containing the proceedings before the Immigration Service and the district court. The pertinent exhibits, which are in an "Exhibit Volume," will be referred to as "Ex." followed by number and page.

JURISDICTION

The judgment of the court of appeals was entered on February 5, 1962 (C.A. App. 6). A petition for rehearing was denied on March 7, 1962 (C.A. App. 7; Pet. App. 7a). The petition for a writ of certiorari was filed on May 4, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's two convictions for conspiracy to violate the Internal Revenue laws were for crimes involving moral turpitude within the meaning of Section 241(a)(4) of the Immigration and Nationality Act of 1952.

2. Whether the order to show cause adequately informed petitioner of the grounds relied upon for his deportation.

STATUTE INVOLVED

Section 241(a)(4) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 204, provides in pertinent part:

> (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> * * * * *
>
> (4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless

of whether the convictions were in a single trial;

* * * * *

STATEMENT

Petitioner brought a complaint in the District Court for the Northern District of Illinois attacking an order of deportation issued against him on August 10, 1959. The district court granted respondent's motion for summary judgment. The Court of Appeals for the Seventh Circuit affirmed.

The underlying facts are as follows: On June 5, 1959, an order to show cause was served upon petitioner informing him that his deportation was sought under Section 241(a)(4) of the Immigration and Nationality Act of 1952, *supra*, on the ground that, after entry into this country, he had been "convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct, to wit, conspiracy to violate Internal Revenue Act, Section 88, Title 18, United States Code,[1] two offenses" (Ex. 1, p. 95–95a; R. 133; see also R. 21–25). The order to show cause further specified that the two conspiracy convictions had occurred on December 29, 1938, and June 10, 1941, respectively, both in the United States District Court at Hammond, Indiana (Ex. 1, p. 95).

At a hearing it was shown that petitioner had been convicted after a trial by the court on December 29,

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[1] Section 88 of the 1940 Code is now 18 U.S.C. 371.

[2] During the hearing, the order was corrected without objection to show that the second conviction was obtained at South Bend, Indiana (R. 69–70).

1938, in the United States District Court for the Northern District of Indiana, on a one-count indictment brought under the general conspiracy statute (then 18 U.S.C. (1940 ed.) 88). The indictment charged that, from October 1937 until the fall of 1938, petitioner had "unlawfully, knowingly, wickedly, corruptly and feloniously" conspired with others to violate the Internal Revenue laws by the commission of various substantive offenses—among others, "knowingly and wilfully to defraud the United States of tax on distilled spirits" (Ex. 11, pp. 117–118; see R. 138). Although this allegation did not refer to any specific section of the Internal Revenue Code in support of this charge, it apparently rested upon 26 U.S.C. (1940 ed.) 2806(f) and 2833. These provisions impose a fine and prison sentence where any person carries on the business of a distiller with intent to defraud the United States of the tax on spirits distilled by him. The other stated objects of the conspiracy were (1) to carry on the business of being a retail and wholesale liquor dealer in distilled spirits without having paid the special tax provided by law; (2) to remove and aid in the removal of distilled spirits, on which no tax had been paid, to a place not a distilling warehouse or a bonded warehouse as required by law; (3) to conceal and aid in the concealment of spirits so removed; (4) to possess 120 gallons of alcohol and other quantities of distilled spirits which did not bear tax stamps; (5) to carry on a business of a distillery without the required statutory bond; and (6) to make mash for distillation or for production of spirits in an unauthorized distillery (Ex. 11, p. 118; R. 138–

140). Petitioner was sentenced to 180 days' imprisonment (Ex. 11, p. 115; R. 116, 119).

On January 10, 1941, petitioner was again convicted in the same district court on his plea of guilty to a one-count indictment charging a similar, but unrelated, conspiracy to violate the Internal Revenue laws. The indictment charged, in addition to the six numbered allegations in the first indictment, that the objects of the conspiracy were to defraud the United States of tax on distilled spirits and to set up an unregistered still (Ex. 12, p. 117–119; R. 139–140).[1] Petitioner was sentenced to two years' imprisonment (Ex. 12, p. 28; R. 120, 140).

The Special Inquiry officer and the Board of Immigration Appeals ruled that these convictions were for crimes involving moral turpitude under the decision of this Court in *Jordan v. De George*, 341 U.S. 223 (R. 120–123, 129–146). The Board considered and rejected petitioner's argument that the convictions should not be treated as crimes involving moral turpitude on the theory that the conspiracy embraced the commission of substantive offenses some of which did not involve any element of fraud. After detailing the various objects of the two conspiracies as charged in the indictments (R. 138–140), the Board pointed out that they revealed that petitioner had been a "large-scale operator engaged in a sizeable business of distilling, transporting, concealing and selling alco-

[1] This indictment was the same as the second indictment involved in *Jordan v. De George*, 341 U.S. 223, both petitioner and De George, among others, being named as co-defendants (see Record in No. 348, Oct. Term 1950, pp. 32–37).

hol and distilled spirits," and that it could find no features which distinguished the case from that of *De George* (R. 143).

ARGUMENT

1. Petitioner does not seek to have this Court reconsider its ruling in *Jordan* v. *De George*, 341 U.S. 223, that conspiracy to defraud the United States of taxes on distilled spirits is a crime involving moral turpitude as that term is used for purposes of deportation (now Section 241(a)(4) of the Immigration and Nationality Act of 1952, *supra*, pp. 2–3). He argues that the two conspiracy convictions in this case did not necessarily involve fraud on the government, since each could have been sustained on any one of the named objects of the conspiracy some of which do not necessarily involve fraud. He admits that the same situation was present in the *De George* case (indeed the second conviction of petitioner and De George were under the same indictment) but argues that this point was not raised or considered in that case.

While it is true that the issue raised by petitioner was not specifically raised by the parties in *De George*, it does not follow, as petitioner contends (Pet. 14–19), that the Court's decision has no application to the instant case. It should be noted that although the "question of vagueness was not raised by the parties nor argued" (341 U.S. at 229), the Court in *De George* dealt with that question in detail. The language of the opinion shows that this Court examined and considered the full import of each indict-

ment in reaching its decision. The majority opinion pointed out (341 U.S. at 225, note 5):

> The record establishes that respondent was a large-scale violator engaged in a sizable business. The second indictment alone charged him with possessing 4,675 gallons of alcohol and an undetermined quantity of distilled spirits. At the rate of $2.25 a gallon then in effect, the tax on the alcohol alone would have been over $10,000.

Similarly, the dissenting opinion of Mr. Justice Jackson concluded that each conviction was founded on fraud, stating "[t]he fraud involved here is nonpayment of a tax. The alien possessed and apparently trafficked in liquor without paying the Government its tax. That, of course, is a fraud on the revenues" (341 U.S. at 240). In other words, neither the majority nor dissenting opinion in *De George* considered the various objects of each conspiracy as separable and independent, but rather as interlocking facets of business ventures—the prevading criminal aim of which was to defraud the government.

Similarly, the two conspiracies charged against petitioner (one of which was the same as in *De George*) were to engage in a business which necessarily involved petitioner's cheating the government. Cf. *Braverman* v. *United States*, 317 U.S. 49; *United States ex rel. Berlandi* v. *Reimer*, 113 F. 2d 429, 430–431 (C.A. 2). The various objects of the conspiracies did not relate to isolated acts of an individual who, because of economic circumstances, sought to avoid his financial responsibility to the government; rather, each of the conspiracies, as shown by the substantive violations which

were their objects, involved large-scale operators who deliberately engaged in the illicit enterprise of distilling and trafficking in non-tax-paid liquor (see the Statement *supra*, pp. 4–5). To attempt, as petitioner does, to isolate and disassociate the objectives of these unified schemes is to distort the true picture of the criminal ventures. Some 4,795 gallons of alcohol, an undetermined quantity of distilled spirits, and a tax on the alcohol alone (at the rate of $2.25 per gallon) of approximately $10,798 were involved in the two indictments (R. 143). As this Court said in another context in *United States* v. *Patten*, 226 U.S. 525, 544, "[T]he character and effect of [the] conspiracy is not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole."

In these circumstances, petitioner cannot rely upon cases which say that in order to support a conspiracy conviction the government is not obliged to prove all the objects of the conspiracy or all the means employed in carrying it out,[5] and that, in determining

[5] Petitioner cites (Pet. 10) *Christiansen* v. *United States*, 52 F. 2d 950 (C.A. 5), and *Langley* v. *United States*, 8 F. 2d 815 (C.A. 6), for these propositions. In *Christiansen*, the court held that where the objects of a conspiracy are separable it is not fatal to conviction that the evidence does not establish commission by the defendant of each of the objects charged. In *Langley*—a single object conspiracy—the conviction was affirmed even though the government did not "prove in detail all of the allegations in the indictment relating solely to the means to be employed in carrying out the conspiracy" (8 F. 2d at 819). Apart from the obvious factual differences discussed above, the instant case is distinguishable since there is no indication that the evidence failed to show that petitioner participated in the fraud and the other illegal objects charged in the conspiracies.

whether a conviction involves moral turpitude, the standard of least culpability necessary to support the conviction is to be employed." As the Board of Immigration Appeals held, "a composite of all the specifications [in the two indictments] permit of only one construction, namely, that each indictment charges a conspiracy to defraud the United States Government by avoiding taxes levied under the Internal Revenue laws" (R. 145–146).

2. There is no merit to petitioner's claim that the deportation order entered against him was invalid because the order to show cause failed to state adequately the grounds for deportation. Section 242(b) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 209, provides that "the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceeding will be held." The order to show cause in this case complied with this requirement. It informed petitioner of the grounds for deportation, *i.e.*, two separate convictions for crimes involving moral turpitude. The order stated the crime charged—conspiracy to violate the Internal Revenue laws—and the time,

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"The cases which petitioner cites in this connection (Pet. 13–14) are *United States ex rel. Zaffarano* v. *Corsi*, 63 F. 2d 757 (C.A. 2), which involved a conviction for second-degree assault where the indictment was not part of the record in the deportation hearing, *United States ex rel. Guerino* v. *Uhl*, 107 F. 2d 399 (C.A. 2), where the conviction alleged to involve moral turpitude was for possession of "one jimmy," and *United States* v. *Zimmerman*, 71 F. Supp. 534 (E.D. Pa.), where the conviction was for prison break. None involved, as this case, conspiracies to violate the Internal Revenue laws by engaging in the business of illegal traffic in distilled spirits.

place, and nature of each conviction. The order was not required to allege expressly that each conviction involved the element of fraud when it charged that each involved moral turpitude. The order was clearly adequate to enable petitioner to meet the charges; indeed, it is difficult to understand how the additional allegation petitioner would require would have helped him in any way.[7]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1962.

[7] The cases relied upon by petitioner are inapposite. For example, in *Wong Sun Fay* v. *United States*, 13 F. 2d 67 (C.A. 9), the order of arrest (comparable to an order to show cause) did not charge a deportable offense. In overturning the order of deportation the Ninth Circuit said (13 F. 2d at 68): "If, therefore, the appellant was ordered deported for the reason stated in the two warrants, the deportation was unauthorized, and if ordered deported for some other reason, of which he was not advised, the hearing was manifestly unfair." To the same effect, see *Lo Hop* v. *United States*, 257 Fed. 489, 493 (C.A. 6) and *Takeo Tadano* v. *Manney*, 160 F. 2d 665 (C.A. 9), which are also relied upon by petitioner (Pet. 21-23). In the instant case, the order to show cause specified in clear detail a deportable charge, and it was on this charge that, after a full hearing, the order of deportation was based.

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